NO. 69

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

ROBERT A. BELL, JR.,

Petitioner

VS.

THE STATE OF TEXAS,

Respondent

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF FOR THE RESPONDENT

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES the State of Texas in opposition to Petitioner's Application for Writ of Certiorari and states:

OPINION BELOW

The Opinion of the Court of Criminal Appeals of Texas is reported at 387 S.W. 2d 411.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under Title 28, U.S.C. 1257, Section 3. Respondent respectfully submits that no substantial federal question is presented for review by the Supreme Court of the United States.

QUESTION PRESENTED

Has Petitioner been denied due process of law and equal protection of the law under the Fourteenth Amendment of the Constitution of the United States of America as a result of the reading to the jury of Petitioner's prior conviction under Article 62, Vernon's Annotated Penal Code of Texas, for purposes of enhancement?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These are reproduced in Petitioner's Brief.

STATEMENT OF FACTS

Petitioner's Statement of Facts is substantially correct with the exception that the court in its charge instructed the jury not to consider Petitioners' prior convictions in passing upon the issue of guilt.

ARGUMENT AND AUTHORITIES

I.

The Texas habitual offender procedures in effect at the time of Petitioner's trial do not offend due process.

Petitioner was not denied due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States because the indictment under which he was charged alleged a prior conviction and was read to the jury and proof of the prior conviction was made before the jury following the submission of proof of the principal offense. In support of this contention, Petitioner relies on *Lane*

v. Warden, Maryland Penitentiary, 320 F. 2d 179 (4th Cir. 1963).

The United States Court of Appeals for the Fifth Circuit undertook the determination of this question in the instant case in *Breen v. Beto,* 341 F. 2d 96 (5th Cir. 1965), which was decided on January 28, 1965. In that opinion, the Court disposes of *Lane v. Warden,* supra, with the following statement at page 97:

> "In support of his contention, appellant cites and strongly relies on Lane v. Warden, 320 F(2) 179 (4th Cir. 1963). This court has never so held, and under the controlling Texas Statutes and the authorities we are not disposed to adopt or follow the cited opinion. On the contrary, we are of the firm view that that case was not well decided and that the correct view of the law is otherwise."

The Court of Appeals for the Fifth Circuit has also considered this matter in the cases of *Reed v. Beto,* 343 F. 2d 723; *Taylor v. Beto,* 346 F. 2d 157; and *Reyes v. Beto,* 345 F. 2d 722. The same contention was presented to the Supreme Court of the United States in the case of *Wendell Odell Stephens v. Beto,* 377 S.W. 2d 139 (1964), by way of application for writ of certiorari. This Court denied certiorari in 1965, 350 U.S. 980, 85 S. Ct. 1344, April 26, 1965.

By way of further discussion of *Lane v. Warden,* supra, Respondent submits the following.

In *Lane,* the Court of Appeals for the Fourth Circuit considered a conviction in a court of Maryland. The defendant was charged by indictment for selling narcotics and in the indictment two prior convictions were alleged for the purpose of enhancing punishment (actually there were three indictments, each charging

a principal offense together with two prior convictions). The defendant objected to the reading of the indictments because they contained the prior convictions, but his objection was overruled. The Court of Appeals held that the reading of the indictments with their allegations of prior convictions denied the defendant a fair trial because the fairness of the jury was impaired by the knowledge of the defendant's prior criminal history.

Respondent disputes the applicability of *Lane v. Warden,* supra, urging that the facts of *Lane* are not analogous to the present case and also that the philosophy underlying the *Lane* decision is illogical and erroneous.

The Lane opinion at page 186 puts special emphasis on the proposition that the prejudice resulting from the reading of the two prior convictions to the jury could have been avoided by the State's following alternative Maryland procedures. No alternative methods of proving prior convictions are available under Texas practice.

Second, the defendant in *Lane* was charged under three indictments, each alleging the crime in issue, plus two prior convictions. Only one indictment is involved in the present case.

However, regardless of the facts and circumstances which distinguish LANE V. WARDEN ***from the case before this Court, Respondent strongly urges that the reasoning in*** LANE V. WARDEN ***is specious and should not be followed.***

Wolfe v. Nash, 313 F. 2d 393 (8th Cir. 1963) cert. den. 376 U.S. 933, 84 S. Ct. 705 (Feb. 24, 1964) is

directly contra to *Lane v. Warden.* In *Wolfe v. Nash,* the evidence of prior felony convictions of the defendant was offered in the presence of the jury and it was argued by the defendant that a fair trial was denied. The Court disposed of this proposition, saying at page 401:

> "... How and in what way proof of prior convictions shall be made under the State Habitual Criminal statute and what effect a deviation from the requirements of the statute would have, we regard as purely a local legal problem and of no national concern whatever. The due process clause of the Fourteenth Amendment does not enable us to review errors of state law."

The Texas decisions have uniformly upheld the constitutionality of its habitual offender enhancement statutes. *Mackie v. State,* 367 S. W. 2d 697 (1963).

Not only is *Lane v. Warden* an innovation in criminal and constitutional law, its holding being in direct conflict to *Wolfe v. Nash,* the Fifth Circuit decisions, the Texas authorities, and innumerable other state decisions which have construed habitual offender acts, but *Lane* relies in part on authority that is apparently completely contradictory to the holding. At page 181 of the *Lane* opinion, the Court cites *Michelson v. United States,* 335 U.S. 469 (1948), and quotes at length from this opinion, sought to be distinguished by Respondent. The Court in *Lane* did observe in footnote number 4 at page 182 that the *Michelson* decision had some language which did not accord with the decision in *Lane. Lane* was referring to page 475 in *Michelson* where the Court observes:

> "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts

might logically be persuasive that he is by propensity a probable perpetrator of the crime."

Michelson then states in a footnote appended to this quotation that:

> "This (rule) would be subject to some qualifications, as when a prior crime is an element of the later offense; for example, *at a trial for being an habitual criminal.* There are well-established exceptions where evidence as to other transactions or a course of fraudulent conduct is admitted to establish fraudulent interest as an element of the crime charged." (Emphasis added)

It is difficult to perceive how the *Lane* opinion could cite the *Michelson* case and then purport to distinguish it logically.

Michelson not only clearly suggests that the Supreme Court of the United States approves of the practice in habitual offender cases of informing the jury of prior convictions and offering proof thereof, but *Michelson* also points to the long and firmly entrenched rule that other, extraneous crimes, may be shown to establish intent. Along with intent, proof of extraneous crimes have been permitted to show identity, motive and plan or design. Proof before the jury of crimes committed by the defendant other than those charged in the indictment has been approved by this Court in *Roe v. United States,* 316 F. 2d 617 (5th Cir. 1963), and *Huff v. United States,* 273 F. 2d 56 (5th Cir. 1959).

Lane v. Warden also points out another area where the jury can properly be apprised of crimes which the defendant has committed other than the crime charged. This is where the defendant puts his character in issue through the use of character witnesses or by himself

taking the stand and so permitting interrogation as to previous convictions.

The *Lane* theory that informing the jury of prior crimes must necessarily destroy the impartiality of the jury, is further refuted by the procedures authorized in Rules 8 and 13 of the Federal Rules of Criminal Procedure.

Rule 8 permits the joinder of two or more offenses in the same indictment as well as the joinder of defendants. Rule 13 authorizes the Court to order the consolidation of two or more indictments in a joint trial. Under the authority of these rules, promulgated by the Supreme Court of the United States, an information charging 225 separate and distinct crimes was upheld in *United States v. Taylor,* 207 F. 2d 437 (2nd Cir. 1953). In *Brandenburg v. Steele,* 177 F. 2d 279 (8th Cir. 1949), the defendant was indicted for 11 separate offenses of unlawful sales of narcotic drugs. In discussing Rules 8(a) and 13 and their predecessor statute, the Court observed:

> "... In view of the statute and the Rules prescribed by the Supreme Court above referred to, which authorized the procedure which resulted in the appellant's conviction, it is obvious that he is entirely mistaken in his assertion about denial of due process. He was dealt with in accordance with long established and conventional federal procedure."

Under the philosophy of *Lane v. Warden,* the federal procedure in charging separate offenses in one indictment and the consolidation of indictments should be struck down and declared violative of the constitutional guarantee to a fair and impartial trial. Surely

the impact upon the jury which *Lane* worries about (the reading of an indictment charging two previous convictions) is greater and more destructive to impartiality when an information charging 225 separate offenses is read or when an indictment charging 11, distinct, unlawful sales of narcotics is read. Nevertheless, the federal practice of using multiple-count indictments and the consolidation of indictments finds continued sanction in federal decisions. See *United States v. Rabin,* 316 F. 2d 564 (7th Cir. 1963); *Finnegan v. United States,* 204 F. 2d 105 (8th Cir. 1953) cert. den. 346 U.S. 821, reh. den. 346 U.S. 880; *United States v. Pullings,* 321 F. 2d 287 (7th Cir. 1963); *Williams v. United States,* 317 F. 2d 545 (C.A.D.C. 1963). See also *Gore v. United States,* 244 F. 2d 763 (C.A.D.C. 1957) affirmed 357 U.S. 386.

This Court has recently considered charges involving a multi-count information in *Mishkin v. New York,* —— U.S. ——, 34 L.W. 4250 (1966), and *Ginzburg v. United States,* —— U.S. ——, 34 L.W. 4255 (1966). In *Mishkin* this Court considered a New York information charging 159 counts of obscenity. The defendant was convicted on 141 counts, and this Court affirmed the convictions without consideration or concern for the possible inherent prejudice that would accrue to a defendant charged under such an information.

In *Ginzburg,* a conviction under a Federal indictment charging 28 separate offenses of the federal obscenity statute was reviewed. Again this Court upheld the conviction without discussing possible prejudice that could arise under a multi-count indictment.

Respondent does not quarrel with the general rule that evidence showing the accused has committed a crime or crimes independent of the crime charged is inadmissible. The basis of this tenet is that the tendency of such evidence to prejudice the jury outweighs the probative evidentiary value in the usual case. However, the rule is not a constitutional right, but rather is a rule of evidence. *Baltimore Radio Show v. State,* 67 A. 2d 497, 510, reversed on other grounds. The limitation on the admission of evidence of other crimes is subject to a number of exceptions, as have been noted above, the exceptions being founded on considerations of justice and wisdom just as is the exclusionary rule itself. *Gianotos v. United States,* 104 F. 2d 929 (8th Cir. 1939); *Braggs v. United States,* 176 F. 2d 317, 321 (10th Cir. 1949) cert. den. 338 U.S. 861. In the case of habitual offenders, the purpose of the statutes is to protect society from a person or from criminals who persist in the commission of crime and by serving as a warning to first offenders. *Gore v. United States,* supra. These considerations override, and logically so, the rule forbidding the introduction of and proof of other crimes.

Respondent submits that the Texas practice of handling habitual offenders (in effect at the time of Petitioner's trial) in no way denies to defendants a fair and impartial trial under all principals, standards and doctrines of the law (except *Lane v. Warden*). Respondent does not say that there could not be a better method of proving prior crimes for the purpose of enhancing punishment or a method that is more favorable to the defendant (and indeed, Texas has recently amended its recidivist statutes), but Respond-

ent does maintain that the former Texas procedure in no way contravenes any of the protections or rights guaranteed by the United States Constitution.

It should be noted that the holding in *Lane v. Warden* is not to be given retrospective application under the holding in *Henderson v. Warden,* 248 F. Supp. 917, 1965 (4th Circuit).

Petitioner also seems to rely upon the case of *United States v. Banmiller,* 310 F. 2d 720 (3rd Cir. 1962) cert. den. 374 U.S. 828, 83 S. Ct. 1866. Respondent likewise submits that this case is not in point and should be overruled. The decision relies solely upon the reason contained in *Betts v. Brady,* 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595 (1942), expressly overruled by this Court in *Gideon v. Wainwright,* 372 U.S. 335, abolishing the distinction for all purposes between capital and non-capital prosecutions insofar as the Fourteenth Amendment to the Constitution of the United States of America is concerned.

II.

Should this Court hold the Texas habitual offender statutes violative of due process, the decision should not be retroactively applied.

Respondent strongly suggests that this Court determine that the recidivist statutes of Texas do not violate due process. However, should the Court determine otherwise, Respondent urges that any decision vitiating the recidivist procedures of Texas be given only prospective application.

This Court, in recent decisions, has abandoned the

Blackstonian theory of judicial decisions which held that courts were discoverers and interpreters of the law rather than creators. Now it is conceded that the Court makes and creates new law. In these recent decisions, this Court has also become increasingly sensitive to the impact which newly defined constitutional rights have on the administration of state criminal laws and has restricted the applicability of these rights. See *Linkletter v. Walker,* 381 U.S. 618 (1965); *Tehan v. Shott,* 382 U.S. 406 (1966); *Johnson v. New Jersey,* —— U.S. ——, 34 L.W. 4592 (decided June 20, 1966).

The instant case, and others in which the Texas habitual offender procedures complained of here were involved, presents some of the considerations which the Supreme Court has thought important in limiting a ruling which announces a new constitutional principle for observance by state courts. Here, the State of Texas came to rely on its recidivist procedures by the refusal of the Supreme Court to consider and condemn the practice throughout the many years of the rule's application. Furthermore, the condemnation of the Texas procedure would unquestionably seriously disrupt the administration of our criminal jurisprudence by the mass release of many prisoners whose conviction was obtained in a trial where the punishment enhancement statutes were applied.

Respondent is suggesting an extension of the principles announced by *Linkletter, Tehan* and *Johnson v. New Jersey* that will permit a Federal Court to condemn a practice presented to it by habeas corpus proceedings or by certiorari, but provide by the decision that the ruling of the Court is not to apply to any case already tried including the case then before

it. In other words, if the Court feels that a certain practice is violative of due process and the decision creates a new constitutional right applicable to state prosecutions, then the Federal Courts should announce that the rule is applicable only to cases which are tried after the date of the decision but is not applicable to the case in which the decision was rendered or to any other case tried prior to the decision date.

Here Petitioner's conviction became final in 1962 when the judgment of the trial court was affirmed by the Texas Court of Criminal Appeals in *Reed v. State,* 353 S.W. 2d 850 (June 10, 1962), and the time for applying for certiorari from this Court expired. Any rule announcing a constitutional right that would destroy the recidivist practice in Texas in operation at that time should not, accordingly, be applied to the case now before the Court.

It should be observed that Texas has amended its habitual criminal procedure in its new Code of Criminal Procedure which became effective on January 1st of this year. Now the portions of the indictment charging prior offenses are not read to or proved before the jury until and unless the jury has returned a verdict of guilty with respect to the primary offense. See Articles 36.01 and 37.07, Texas Code of Criminal Procedure, 1966, copies of the pertinent portions being appended to this brief as Appendix "A." A state statute enacted since the commencement of litigation may bar a consideration of the Federal question presented even though the new statute is not applicable to the case under consideration. *Rice v. Sioux City Cemetery,* 349 U.S. 70 (1955).

Respondent does not mean to imply by the foregoing suggestions (that a new constitutional rule should be applied in a completely prospective manner) that it is felt that the old Texas recidivist practice offends the Constitution. Respondent again reiterates that such procedures in no way violate the Constitution and submits the prospective application theory as an alternative reason for upholding the conviction under consideration here.

CONCLUSION

WHEREFORE, premises considered, Respondent prays the Court to affirm the holding of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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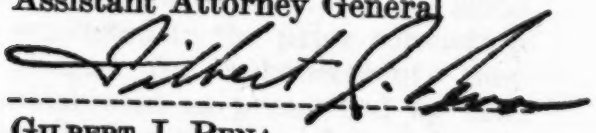

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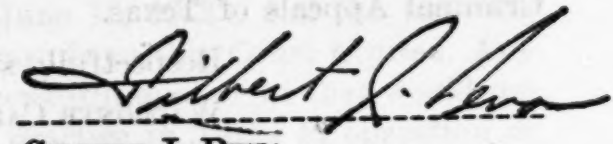
CERTIFICATE OF SERVICE

I am an Assistant Attorney General of the State of Texas and a member of the Bar of the Supreme Court of the United States, and do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Respondent; I do further certify that a copy of the foregoing brief has been forwarded by United States Mail, First Class, Postage Prepaid, to Mr. Tom R. Scott, 1006 Midland National Bank Building, Midland, Texas 79701, Attorney for the Petitioner, this the 12th day of September, 1966.



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APPENDIX "A"

Article 36.01, Texas Code of Criminal Procedure, 1966:

"A jury being impaneled in any criminal action, the cause shall proceed in the following order:

"1. The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.

". . . ."

Article 37.07, Texas Code of Criminal Procedure, 1966:

". . . .

"2. Alternate procedure.

". . . .

"(b) If a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense charged where the same is not absolutely fixed by law to some particular penalty except when the defendant, upon the return of a finding of guilty, requests that the punishment be assessed by the same jury. In the event the defendant elects to have the jury fix the punishment in cases where the punishment is fixed by law, the court shall instruct the jury that if they find the defendant is the same person who was convicted in the prior conviction or convictions alleged for enhancement, they should set his punishment as prescribed by law.

"Regardless of whether the punishment be assessed by the judge or the jury, evidence may be offered by the State and the defendant as to the prior criminal record of the defendant, his general reputation and his character.

". . . ."